legal standards governing the business practices of joint ventures and, concomitantly, undermined the legal certainty critical to the ability of businesses to engage in joint venture activity. The significance and chilling effect of the decision below, if not reversed, cannot be overstated, because joint ventures are indispensable to the U.S. economy.

For these reasons, the Court should reverse the decision below to correct the Ninth Circuit's fundamental errors, to reaffirm the appropriate antitrust standards under which joint venture activity is assessed, and to prevent a chilling effect on the formation and operation of legitimate, pro-competitive joint ventures.

ARGUMENT

I. The Court Of Appeals Erroneously Held That The Post-Formation Pricing Practices Of An Integrated Joint Venture Give Rise To A Cognizable "Agreement" Under Section 1 Of The Sherman Act, And That Such Practices Can Properly Be Condemned As Illegal *Per Se*

The court below held that the respondents stated a triable issue of fact as to whether a joint venture's "unified pricing scheme was a *per se* violation of § 1 of the Sherman Act." PA 28a. The court reached this conclusion by misapplying well-settled antitrust law to the facts as alleged. The court of appeals erroneously concluded that a factual issue existed as to whether the pricing practices had been adopted by competing independent entities, rather than a single, economically integrated joint venture. But, assuming *arguendo* that the requisite plurality existed for purposes of finding an underlying "agreement," Equilon's price-setting practices cannot properly be condemned as a *per se* violation of Section 1 of the Sherman Act.

The court of appeals' misguided analysis flies in the face of the following undisputed facts of record, which

demonstrate the legitimacy of the joint venture, the unilateral nature of its price-setting actions, and the economic benefits that it created:

- Equilon is one of two wholly-owned joint ventures formed by Shell and Texaco to refine, transport, and market gasoline products in the United States. The creation of the joint ventures was approved by the Federal Trade Commission ("FTC") and several states attorneys' general, following an in-depth review. PA 4a.
- The court of appeals itself conceded that the joint ventures were "bona fide." PA 16a. *See also* PA 4a ("There is a voluminous record documenting the economic justifications for creating the joint ventures.").
- Upon formation, Shell and Texaco transferred at least "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees" to the joint ventures. *Id.* at n.3. After transferring these assets to the joint ventures, Shell and Texaco ceased to compete in this market in the United States. PA 4a.
- Equilon operated in the Western United States and had an exclusive license to sell gasoline under the Shell and Texaco brand names in that region.
- The pricing provision in the joint venture agreement was entirely contingent on the formation of the joint ventures, and came into effect only *after* the joint ventures had been formed and Shell and Texaco had exited the respective markets. PA 5a.
- Following Equilon's formation, a single individual at Equilon set prices for the products refined, transported, marketed, and sold by Equilon. *Id.* Equilon priced *only* the products that it manufactured and owned.

- Equilon produced significant efficiencies and cost savings.

These facts underscore the gravity of the Ninth Circuit's error, which this Court should correct.

A. The Court Of Appeals' Decision Contradicts This Court's Holding In *Copperweld* That Section 1 of the Sherman Act Does Not Apply To Unilateral Conduct

The court of appeals held that a triable issue of fact existed as to whether Shell's and Texaco's agreement that Equilon would set prices for its products constituted a *per se* violation of Section 1 of the Sherman Act. The record is clear, however, that this "agreement" was entirely contingent on the formation of the proposed joint venture, and that it took effect only *after* the Equilon joint venture had been formed. PA 6a. As a consequence, there was no cognizable price fixing "agreement" between independent economic actors. Rather, the actual conduct at issue – the setting of uniform prices for the Shell and Texaco brands – pertained only to the venture's own output and took effect only once the joint venture came into existence. In this regard, the court of appeals' analysis is at odds with this Court's determination in *Copperweld Corp. v. Independence Tube Corp.*, in which the Court held that a single entity by its nature cannot conspire with itself. 467 U.S. 752, 768 (1984).

In *Copperweld*, this Court stated explicitly that the reach of Section 1 of the Sherman Act is limited to concerted activity by independent entities in unreasonable restraint of trade. *Copperweld Corp.*, 467 U.S. at 769 ("The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms 'contract, combination . . . or conspiracy' in § 1 [of the Sherman Act]."). If the conduct in question does not involve separate economic actors, there can be no Section 1 claim. *See id.* at 768 (stating that

"wholly unilateral" conduct cannot be unlawful under Section 1 of the Sherman Act).

The court of appeals conceded that Equilon was a legitimate joint venture between Shell and Texaco, and there is no allegation that Shell and Texaco improperly coordinated their prices prior to the formation of the joint venture. Nonetheless, the court reviewed Equilon's pricing practices as though it had been undertaken by independent economic actors. The court of appeals relied heavily on the fact that Equilon sold products under the Shell and Texaco brands, notwithstanding that in the same breath, the court conceded that the brands had been brought under the control of a single joint venture and were no longer competitors.[3] The court of appeals' preoccupation with separate brands distracted the court from the key analysis that it should have applied. It effectively confused *multiple brands* with *multiple actors*.

The correct analysis – which was not followed by the court of appeals – focuses on whether the conduct alleged involved independent economic actors. *See Copperweld Corp.*, 467 U.S. at 769 (stating that a court must examine whether the challenged conduct arises from an agreement of "separate economic actors pursuing separate economic interests"). So long as the conduct in question is that of a "single economic unit," "the very notion of an 'agreement' in Sherman Act terms . . . lacks meaning." *Id.* at 771. Since

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[3] The court of appeals framed the question before it: "[D]efendants have asked us to find an exception to the *per se* prohibition on price fixing where two entities have established a joint venture . . . [but] continue to sell their *formerly* competitive products and distinct brands." PA 13a (emphasis added). "The question is whether two *former* . . . competitors may create a joint venture in which they unify the pricing . . . of two of their distinct product brands." PA 26a (emphasis added).

Equilon was a "single economic unit" following its formation, this should have been dispositive under *Copperweld*.

The court of appeals attempted to sidestep *Copperweld* by positing that Shell and Texaco agreed to fix prices *before* forming the lawful joint venture in Equilon: "[T]he companies fixed the prices of those two brands of gasoline... by agreeing *ex ante* to charge the exact same price for each." PA 13a. The court reasoned: "[T]he decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors." PA 19a.

Even assuming *arguendo* that Shell and Texaco entered into the posited agreement "*ex ante*", that is, prior to Equilon's formation (as respondents allege and the court of appeals assumed), no one contends that the agreement had any force or effect *before* Equilon was formed.[4] Rather, it is undisputed that any such "*ex ante*" agreement was incident to discussions between Shell and Texaco regarding how the joint venture would operate *following* its formation, and that it was entirely conditional on the successful formation of the joint venture following its review and clearance by the FTC and several states Attorneys General.

The Ninth Circuit goes to great lengths in a futile effort to establish that the "*ex ante*" agreement was not "ancillary" to the joint venture. In point of fact, however, the instant case involved the *complete integration* of Shell's and

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[4] In fact, the court of appeals states that "the record reveals that, either immediately before the formation of the joint ventures or sometime shortly thereafter, 'a decision was made that the Shell and Texaco brands would have the same price in the same market areas." PA 6a. The court of appeals' utter disregard for *Copperweld* underscores the fundamental flaw in its concerted conduct analysis under Section 1.

Texaco's downstream operations. That pricing of the Shell and Texaco brands would be under unitary control was therefore implicit in the joint venture itself – just as it would be in any merger. Herbert Hovenkamp notes: "[A]greements about price are often essential to the administration of certain joint ventures, particularly in distribution." XI Herbert Hovenkamp, Antitrust Law § 1908e, at 264 (2005) [hereinafter Hovenkamp, *Antitrust Law*]. *See also Broad. Music, Inc., v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979). Citing the GM and Toyota joint venture to manufacture automobiles, Hovenkamp goes on to explain: "Once the automobiles are manufactured [by the joint venture], they are jointly owned and cannot be sold without an agreement between the owners as to the price to be charged for them . . . ." Hovenkamp, Antitrust Law § 1908e, 264 (2005).

In sum, the posited "*ex ante*" agreement was intrinsic to the formation of the joint venture itself, was entirely contingent on the successful formation of the venture, and had absolutely no force or effect until after the venture was formed. Viewed in this context, the court of appeals' attempt to distinguish the *Copperweld* doctrine is demonstrably misguided. The basic flaw in the court of appeals' analysis was its failure to appreciate that post-formation joint venture conduct should be treated as single-firm conduct, consistent with this Court's teaching in *Copperweld*.[5]

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[5] While it is undisputed that a joint venture's formation is not exempt from scrutiny under Section 1, neither the court of appeals nor respondents take issue with the legality of the underlying joint venture agreement, pursuant to which Shell and Texaco agreed to combine their operations and thereby end competition between them in the joint venture's field.

The illogic of the court of appeals' newly-minted "*ex ante* agreement doctrine" is demonstrable in that it would subject single-firm conduct to ongoing Section 1 scrutiny whenever parties to a proposed joint venture – or, for that matter, a proposed merger – engage in discussions directed at how the unified enterprise will be run following its formation. And, to the extent that the parties to the proposed joint venture or merger are horizontal competitors (as is often the case), when the merged business subsequently implements the contemplated business plan, this misguided doctrine necessarily would result in *per se* condemnation of the unified business's future conduct.

In sum, the court of appeals' novel "*ex ante* agreement doctrine" contradicts this Court's decision in *Copperweld*, common sense, and sound antitrust policy. For all of these reasons, it should be soundly rejected by the Court. Judge Fernandez, writing in the dissent below, captured the nub of the issue when he aptly observed:

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?

PA 31a (Fernandez, J., dissenting).

B. The Court of Appeals Erroneously Held That A Joint Venture's Pricing Practices Can Be Condemned As *Per Se* Illegal

1. It Is Well-Settled That *Bona Fide* Joint Venture Conduct Is Subject To Rule Of Reason Analysis Under Section 1 Of The Sherman Act

As this Court has stated, while the "*per se* rule is a valid and useful tool of antitrust policy and enforcement . . . easy labels do not always supply ready answers." *Broad. Music, Inc.*, 441 U.S. at 8. This case illustrates an important corollary: erroneous labels supply equally erroneous answers.

Here, the court of appeals effectively assumed *a priori* that the petitioners' conduct was *per se* unlawful. This fallacious assumption is illustrated by the court's framing of the issue as whether there is "an exception to the *per se* prohibition on price fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands." PA 13a.

At the outset, it should be noted that the "issue" identified by the court of appeals is a non sequitur because, by definition, there are *no* exceptions to the *per se* rule. More to the point, the court of appeals turned the entire analysis on its head: it is well-settled that the rule of reason is the prevailing analytical formulation for assessing the legality of conduct under Section 1 of the Sherman Act. *See Cont'l T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)) (stating that the Court "has established the 'rule of reason' as the prevailing standard of analysis" under Section 1 of the Sherman Act). It is also well-settled that the *per se* analysis is confined strictly to those exceptional categories of conduct which have a "pernicious effect" on competition and

"lack . . . any redeeming virtue." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Moreover, it has been consistently held that joint ventures[6] are *not* included among those categories of conduct that are susceptible to condemnation under the *per se* rule:

> [C]ombinations, such as . . . joint ventures, . . . hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason: an inquiry into market power and market structure designed to assess the combination's actual effect.

Copperweld Corp., 467 U.S. at 768; *accord Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 117 (1984) (refusing to apply the *per se* rule to a horizontal restraint on price competition); *Broad. Music, Inc.*, 441 U.S. at 23; *United States v. Penn-Olin Chem. Co.*, 378 U.S. at 170. *See also Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Polk Bros, Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985); *Nat'l Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986); U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 1.2

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[6] The rule of reason governs not only the formation of joint ventures but also restraints that could plausibly contribute to the successful operation of any output enhancing cooperative arrangement, for the reasons explained in the *amicus* brief of Verizon Communications Inc.

(2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) [hereinafter "Joint Venture Guidelines"].[7]

Furthermore, in *Broadcast Music*, the Court held that the issue of licenses at pre-negotiated prices by participants in a legal joint venture does not constitute "price fixing" that is *per se* unlawful under the Sherman Act. 441 U.S. at 24. Rather than automatically declare pricing practices by joint ventures unlawful, the Court recognized:

> Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, *at least not as price-fixing schemes*, where the agreement on price is necessary to market the product at all.

Id. at 23 (emphasis added). Accordingly, joint ventures "should be subjected to a more discriminating examination under the rule of reason." *Id.* at 24.

The court of appeals in the case below departed from these well-settled precedents by holding that Equilon's price-setting practices, or the "*ex ante*" agreement between Shell

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[7] *See also, e.g.*, Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1606-07 (1986); Richard W. Pogue, *Antitrust Considerations in Forming a Joint Venture*, 54 Antitrust L.J. 925, 927 (1985); ("[Joint ventures] can have substantial and direct procompetitive effects. . . . [J]oint ventures are devices that frequently achieve legitimate business advantages. . . ."); *see also* Howard H. Chang et al., *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 (1998).

and Texaco authorizing Equilon to set prices, could constitute a *per se* violation of Section 1. In so doing, the court of appeals relegated Equilon's pricing practices, or the "*ex ante*" agreement authorizing Equilon to set prices, to that very narrow category of "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality – they are 'illegal *per se*.'" *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

This holding is erroneous on its face. Even taking the facts alleged by Respondents as true, there is no dispute concerning the legitimacy of the Equilon joint venture. As Judge Fernandez observed, Equilon is a "true, *bona fide*, economically integrated joint venture." PA 29a (Fernandez, J., dissenting). As such, Equilon's price-setting practices are necessarily subject to review under rule of reason analysis under *Broadcast Music* and the numerous precedents set forth above. The court of appeals' decision is a textbook example of the "overly simplistic and often overbroad" approach, which this Court cautioned against in *Broadcast Music*. 441 U.S. at 9. There, this Court thoughtfully observed: "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* And yet, this is precisely what the court of appeals has held, and this holding should not be allowed to stand.

2. The Court Of Appeals Wrongly Relied On *Citizen Publishing Co. v. United States* As A Basis For Applying *Per Se* Analysis

The court of appeals wrongly relied on *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), as supporting legal authority for applying the *per se* analysis to the Equilon joint venture. The facts in *Citizen Publishing* are distinguishable from those alleged by the respondents and, in all events, *Citizen Publishing* does not stand for the

proposition that a joint venture may not set prices for its products consistent with Section 1 of the Sherman Act.

Unlike Equilon, the entity at issue in *Citizen Publishing* was not a fully integrated joint venture. Rather, *Citizen Publishing* addressed a "joint operating agreement" between the Star and the Citizen (the only two newspapers operating in the city of Tucson, Arizona) which combined the business operations of the papers, but did not integrate the competing papers themselves. *Citizen Publ'g Co.*, 394 U.S. at 133. Pursuant to the joint operating agreement, the newspapers retained control of their respective news and editorial departments, thereby maintaining apparent competition, while they jointly set uniform newsstand and subscription prices, as well as advertising rates. In contrast, Equilon consolidated all refining, manufacturing, distribution, sales, and marketing activities associated with their formerly competing products.

In sum, *Citizen Publishing* was not a decision involving a fully integrated joint venture. Rather, in *Citizen Publishing*, the Court unremarkably condemned a price-fixing agreement between two competing newspapers as a *per se* violation of Section 1 of the Sherman Act. In the context of joint venture analysis, however, even where the pricing practices of joint ventures might have been perceived as price fixing, this Court has declined to condemn them as *per se* unlawful and instead has ordered their review under the rule of reason. *Broad. Music, Inc.*, 441 U.S. at 22. Specifically, the Court held that "joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 1.

In sum, *Citizen Publishing* cannot be read to establish the *per se* rule as the prevailing legal standard in assessing the pricing practices of joint ventures, but that is essentially what

the Ninth Circuit has done. This Court should correct this fundamental error, and limit *Citizen Publishing* to its facts.

II. The Court of Appeals' Decision Compromises The Predictability Of The Legal Treatment of Joint Ventures And Is Detrimental To The Business Community and the U.S. Economy

Because it conflicts with a vast body of precedent from this Court and other courts of appeals, the Ninth Circuit's *per se* condemnation of the price setting practices of an integrated joint venture will undermine the predictability of the antitrust laws governing business associations in the United States. The decision below also will jeopardize the U.S. economy by deterring procompetitive economic activity, including the formation of joint ventures. Businesses of all sizes form joint ventures in the U.S. and internationally. Joint ventures, such as Equilon, "often add [competition] to the market." Indeed, joint ventures are unique because of their "capability in terms of new productive capacity, new technology, a n[e]w product, or entry into a new market." Thomas A. Piraino, *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 8 (1991) (citation omitted) [hereinafter Piraino, *Beyond Per Se*].

A. Joint Ventures Generate Efficiencies And Other Economic Benefits

Joint ventures encompass a wide variety of business associations in which firms work together to engage in legitimate business activities, such as marketing, production, research and development, distribution, sales, and purchasing. *See* Joint Venture Guidelines § 1.1.[8] Joint

[8] *See also* Comment and Hearings on Joint Venture Project, 62 Fed. Reg. 22,945 (Apr. 28, 1997) (defining "joint venture" as all (continued...)

ventures also form for a variety of pro-competitive purposes, including, for example, increasing efficiency, penetrating new markets, and accelerating innovation.[9]

Joint ventures generate efficiencies that otherwise would be unavailable through another economic form – namely, "going it alone" or fully merging. Therefore, creating a joint venture is often preferable to a merger. *See, e.g.*, Piraino, *Beyond Per Se*, 76 Minn. L. Rev. at 8.

A wide range of business associations can be classified as joint ventures – from loose contractual agreements to arrangements that are nearly as integrated as mergers. Piraino, *Beyond Per Se*, 76 Minn. L. Rev. at 2. Joint ventures, therefore, are one of the most flexible economic forms available to business. *See* Michael S. McFalls, *The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 Antitrust L.J. 651 (1998); Rosabeth Moss Kanter, *Collaborative Advantage: The Art of Alliances*, Harv. Bus. Rev. 96-100 (Jul.-Aug. 1994).[10]

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collaborations short of a merger between actual or potential competitors in a relevant market).

[9] *See* David H. Kent, *Joint Ventures vs. Non-Joint Ventures: An Empirical Investigation*, 12 Strategic Mgmt. J., 387-93 (1991).

[10] *See also, e.g.*, Pankaj Ghemawat and Fariborz Ghadar, *The Dubious Logic of Global Megamergers*, Harv. Bus. Rev. 1 (Jul-Aug. 2000) (addressing the flexibility made available to businesses through joint ventures that is unavailable through mergers); Edward B. Roberts, *New Ventures for Corporate Growth*, Harv. Bus. Rev., 1, 2 (Jul.-Aug. 2000) (exploring various alternatives); David Ernst and Tammy Halevy, *Not by M&A Alone: Sometimes alliances make more sense than mergers or acquisitions*, The McKinsey Q., 2004:1, *available at* http://www.mckinseyquarterly.com (same).

Joint ventures are not a recent development. This Court has recognized that "joint ventures were utilized in ancient times . . . . [and] [t]heir economic significance has grown tremendously in the last score of years . . . ." *Penn-Olin Chem. Co.*, 378 U.S. at 169 . Since *Penn-Olin* was decided, joint ventures have only become more important and pervasive in the U.S. economy. One recent study noted that more than 5,000 joint ventures have been launched in just the past five years. James Bamford, David Ernst & David G. Fubini, *Launching A World-Class Joint Venture*, Harv. Bus. Rev. 1, 1 (Feb. 2004). These joint ventures can be found in virtually every sector of the economy. In the year 2000, the largest 100 joint ventures earned more than $350 billion in annual revenues. *Id.*

While these figures represent large joint ventures, they do not include joint ventures formed by small businesses. Commentators explain that small businesses are active joint venture participants.[11] Small business participation in joint ventures is further facilitated by the Small Business Administration, which actively seeks opportunities for small business involvement in joint ventures.[12]

In general, joint ventures, large and small, generate a variety of notable economic benefits:

- Joint Ventures Create More Jobs: Companies involved in joint ventures are disproportionately responsible for

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[11] *See* Marc J. Dollinger and Peggy A. Golden, *Interorganziational and Collective Strategies in Small Firms: Environmental Effects and Performance*, 18:4 J. of Mgmt. 695, 695-716 (1992); Marc J. Dollinger, *The Evolution of Collective Strategies in Fragmented Industries*, 15 Academy of Mgmt. Rev. 266, 266-85 (1990).

[12] For example, the Small Business Administration helps small businesses find form joint ventures and find opportunities. *See* http://usinfo.state.gov/products/pubs/oecon/chap4.htm.

new hiring. In a 2000 study, 81% of joint venture participants planned to hire new workers in the subsequent 12 months. Joint ventures hired nearly one-third more employees than non-joint ventures.[13]

- Joint Ventures Are Responsible For Increased Capital Investment: Joint venture participants are 58% more likely to make major new investments than are non-joint venture participants. Overall, 85% more capital will be invested by those in joint ventures. *See* n .11, *supra* . Significantly, joint ventures also facilitate investment in uncertain industries because of the ability to pool resources and spread risk.[14]

- Joint Ventures Invest More Broadly: "Compared to their counterparts on the sidelines, more CEOs involved in [joint ventures] are planning to increase spending in virtually all investment categories." *See* n.11, *supra.* Commentators agree that joint ventures can be instrumental in penetrating new markets. *See, e.g.*, Piraino, 76 Minn. L. Rev. at 8.

- Joint Ventures Are Prevalent Across Industry: 2000 data suggests that 36% of service companies participate in

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[13] PricewaterhouseCoopers, *Trendsetter Barometer: Joint Ventures Providing High Traction for America's Fastest Growing Companies and the Economy* (Nov. 6, 2000), *available at* http://www.barometersurveys.com (last visited Sept. 7, 2005). This study involved interviews of 421 CEOs of product and service companies identified in the media as the "fastest growing U.S. businesses" from 1995-2000. *Id.*

[14] "In fast-moving, highly uncertain industries, the market tends to prefer alliances to M&A." David Ernst and Tammy Halevy, The McKinsey Q., 2000 No. 4, at 2, available at http://www.mckinseyquarterly.com/article_print.aspx?L2=21&L3&ar=941.

joint ventures, while 29% of product companies participate. *See* n.12, *supra*.

- Joint Ventures Are Efficient: Companies involved in joint ventures expected to contribute 10.6% of their business assets to joint ventures in 2000, yet generate 12.0% of their revenue growth in return – with these revenue figures increasing in subsequent years. *See* n.12, *supra*.

- Joint Ventures Enable Small Businesses to Compete Effectively With Larger Concerns: Cooperative strategies reduce uncertainty for small firms and improve their sales performance. *See* n.12, *supra*.

- Joint Ventures Create Value for Shareholders: One study, based on a sample of 253 announcements of joint ventures involving publicly traded companies, found that "[t]he stock market reacts positively to joint ventures that involve pooling of complementary resources.... Small firms that enter into joint ventures with larger firms earn significant positive abnormal returns, because the joint ventures act[] [as] signals of the small firm's value."[15]

B. Joint Ventures Are Encouraged By The Courts And Federal Antitrust Agencies

The widespread use of joint ventures has been facilitated by judicial decisions and federal agency policies, which have

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[15] *See* Partha Mohanram and Anish Nanda, *When do Joint Ventures Create Value?* Harv. Bus. Sch. Working Paper (Feb. 1998). This study concluded that the stock market rewarded alliances much more richly in electronics, media, and software (nearly three-fourths of the media and entertainment alliance announcements raised the announcing company's stock price by more than one standard deviation), compared with just 53 percent of the acquiring companies in M&A transactions.

established the well-settled legal principle that fully-integrated, legitimate joint ventures will not be summarily condemned under the antitrust laws. This principle provides stability and necessary legal guidance for companies participating in joint ventures. The court of appeals' decision radically departs from this precedent, to the detriment of the entire business community.

As noted above, following the consistent guidance of this Court in joint venture cases, lower courts have uniformly applied the rule of reason in assessing the legality of conduct under Section 1 of the Sherman Act. *See supra* p. 11 (collecting cases).

The DOJ and FTC have likewise accepted this Court's guidance and developed policies that encourage the use of procompetitive joint ventures. The agencies' approach is best illustrated by their Joint Venture Guidelines, which make clear that legitimate joint ventures should be analyzed under the rule of reason. *See* Joint Venture Guidelines § 1.2. Indeed, where, as here, a fully integrated joint venture is under analysis, the Joint Venture Guidelines expressly state that the venture should be subjected to a full merger analysis. *Id.* The predicate for this analysis is the agencies' recognition of the undisputable fact that legitimate joint ventures can promote competition, output, and innovation regardless of whether the joint venture was created to promote efficiency or create a new product. *See id.* at 4.

In view of the consistent guidance supplied by these judicial precedents and agency enforcement policy, there is widespread consensus among legal commentators that where a joint venture is challenged under the antitrust laws, the rule of reason will be applied. *See, e.g.*, XIII Herbert Hovenkamp, Antitrust Law ¶ 2121b, at 126-27 (2d ed. 2005); 2 Eleanor M. Fox & Byron R. Fox, Corporate Acquisitions and Mergers § 21.10, at 21-46 ("Joint ventures are not illegal per se . . . . The antitrust laws reprehend joint

ventures only if they are anticompetitive in essence or are accompanied by unreasonable collateral restraints on parties to the joint venture or unreasonable exclusion from the joint venture or its facilities of outside parties."); 13 Zolman Cavitch, Business Organizations With Tax Planning, § 172.04[2], 172-103 (2003) ("[T]he principal mode of antitrust analysis for evaluating the legality of a joint venture has been essentially the same as that used for a merger or acquisition.").

The court of appeals' decision demonstrates a wholesale disregard of sound antitrust analysis as developed by the courts and the federal antitrust agencies. If this decision is allowed to stand, it will seriously undermine the business community's ability to rely on these well-settled legal principles, and, by expanding the reach of the *per se* rule in unprecedented fashion, it will create unwarranted uncertainty for the business community. In such an uncertain environment, joint ventures are less likely to form or operate, potentially stifling competition, growth, and innovation in every sector of the United States economy.

This Court should reaffirm to the business community that the conduct of legitimately formed joint ventures is subject to antitrust analysis under the rule of reason and cannot be condemned as *per se* illegal.

CONCLUSION

The decision of the court of appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

Of Counsel
STEPHEN A. BOKAT
ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

RAYMOND A. JACOBSEN, JR.
Counsel of Record
JOSEPH F. WINTERSCHEID
M. MILLER BAKER
ANDREA L. HAMILTON
FRANCINE A. HOCHBERG
JOSEPH N. ECKHARDT
MCDERMOTT WILL &
EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Counsel for Amicus Curiae

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In The
Supreme Court of the United States

TEXACO INC., *et al.*,

Petitioners,

vs.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

vs.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF NORTHWEST OHIO PHYSICIAN SPECIALISTS COOPERATIVE, LLC IN SUPPORT OF PETITIONERS TEXACO INC., *ET AL.*

CHARLES D. WELLER
1100 Republic Building
25 Prospect Avenue
Cleveland, OH 44115
(216) 736-7936
Counsel of Record

FREDERICK BYERS
520 Madison Avenue
Toledo, OH 43624
(419) 241-8013

Attorneys for Amicus Curiae
Northwest Ohio Physician Specialists Cooperative, LLC

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF NORTHWEST OHIO SPECIALISTS COOPERATIVE, LLC IN SUPPORT OF PETITIONERS TEXACO INC., *ET AL.*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Northwest Ohio Specialists Cooperative, LLC ("NWOS") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of Petitioners.

Petitioners Texaco Inc. and Shell Oil Company have given consent to the filing of this *amicus* brief. However, counsel for respondents has refused all requests for consent to the filing of *amicus* briefs.

Amicus NWOS is an administrative association of 18 physician groups in different specialties including cardiology, ENT, neurosurgery, urology and orthopedics.

Like the majority of the nearly 600,000 physicians in the United States, NWOS physicians practice in small groups. Thus, they, like other physicians and other health care providers, can proactively participate in innovative efforts to provide better patient care more cost effectively only through what antitrust law terms "joint ventures."

However, as this case vividly illustrates, antitrust joint venture law applied by the court below here and by many others is so unclear, uncertain, risky and expensive to evaluate in the planning and operations stages, let alone defending in court, that many physicians as a practical matter simply cannot risk or afford to participate in or lead the many innovative ventures that health care in the U.S. so desperately needs. Joint ventures can succeed as businesses only with agreements on prices for

customers externally, and with agreements on prices internally with suppliers including providers within the joint ventures.

The formalistic view of *per se* price-fixing by the court below ignores this Court's recent hard work and precedent, as well as sound public policy. This case thus presents a crucial opportunity for the Court to provide the antitrust guidance on joint ventures that the health care field and the Nation so urgently need.

Accordingly, *amicus* respectfully requests leave to file the attached brief.

Respectfully submitted,

CHARLES D. WELLER
1100 Republic Building
25 Prospect Avenue
Cleveland, OH 44115
(216) 736-7936
Counsel of Record

FREDERICK BYERS
824 Spitzer Building
520 Madison Avenue
Toledo, OH 43604
(419) 241-8013

Attorneys for Amicus Curiae
Northwest Ohio Physician Specialists Cooperative, LLC

QUESTION PRESENTED

Whether it is *per se* illegal concerted action under Section I of the Sherman Act for an economically integrated joint venture to set the selling price of its own products.

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INTEREST OF *AMICUS*[1]

Amicus NWOS is an administrative association of 18 physician groups in different specialties including cardiology, ENT, neurosurgery, urology and orthopedics.

Like the majority of the nearly 600,000 physicians in the United States, *amicus* NWOS' affiliated physicians practice in small groups. Thus, they, like other physicians and other health care providers, can proactively participate in innovative efforts to provide better patient care more cost effectively only through what antitrust law terms "joint ventures."

However, as this case vividly illustrates, antitrust joint venture law applied by the court below here and by many others is so unclear, uncertain, risky and expensive to evaluate in the planning and operations stages, let alone defending in court, that many physicians as a practical matter simply cannot risk or afford to participate in or lead the many innovative ventures that health care in the U.S. so desperately needs. Joint ventures can succeed as businesses only with agreements on prices for customers externally, and with agreements on prices internally with suppliers including providers within the joint ventures.

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[1] Petitioners Texaco Inc. and Shell Oil Company have given consent to the filing of this *amicus* brief. However, counsel for respondents has refused all requests for consent to the filing of *amicus* briefs.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The formalistic view of *per se* price-fixing by the court below in this case ignores this Court's recent hard work, precedent and sound public policy. It thus presents a crucial opportunity for the Court to provide the antitrust guidance on joint ventures that the health care field and the Nation so urgently need.

ARGUMENT

I. Joint Ventures Are Now a Vital Form of Doing Business for U.S. Companies and Workers in Today's Global Economy in General, and for Health Care In Particular, and Urgently Need Much Clearer Antitrust Guidance.

The emergence of joint ventures as a vital and economically advantageous form of business entity, in the United States and worldwide, is widely recognized. Joint ventures in the antitrust sense of the term – business "relationships that are not based on *ownership* but on *partnership*" – have become an essential form of doing business in the U.S. and around the world. This central fact of economic development has had wide-ranging implications for the organization of businesses, and it likewise has important implications for the evolution and articulation of federal antitrust doctrine. This case provides the occasion for the Court to undertake this crucial effort.

The importance, indeed, the urgency of new and clear antitrust guidance for joint ventures flows from the economic and technological imperatives that have made them such a powerful emergent economic form. Peter

Drucker, the "preeminent management thinker of our time", explains incisively:[2]

> [T]he trend toward alliances of this sort in which nobody has control – that is, the trend toward partnerships – is accelerating. One reason is that no one company, not even the telephone giants, has enough money to swing the deal alone. A more important reason is that no one company by itself has the needed technology. And in many parts of the world, especially in "emerging countries" like coastal China or Malaysia, business cannot be done except through a joint venture or an alliance with a local partner. "Today," the CEO of a major pharmaceutical company said recently, . . . "[it] is simply impossible for us – and we are among the world's research leaders – to have enough scientific expertise in *all* the new fields. It is equally impossible for us – and we pride ourselves on our marketing organization – to serve all the new channels through which health care products will be marketed as the health care systems of the world are reengineering themselves."

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[2] "Peter Drucker on the New Business Realities," in Symposium: New Foundations For Joint Ventures and Antitrust, 44 *Antitrust Bulletin* 787, 799 (1999) (C. Weller Guest Editor). E.g., there are hundreds of joint ventures in the auto industry world-wide, including the GM-Toyota joint venture. See "Ward's Automotive 'Spider Chart'" & Hogan, "The General Motors-Toyota Joint Venture: A General Motors Perspective," Symposium *supra*, 44 *Antitrust Bulletin* at 791-93, 821-40. Peter Drucker has been described as "the preeminent management thinker of our time" by Theodore Levitt, a former Editor of the *Harvard Business Review*, quoted in Bennett, "Management Guru," *Wall Street J.*, at A-1 (July 28, 1987).

The Federal Trade Commission recognized these powerful forces in 1996, reporting that "Global and innovation-based competition is driving firms toward ever more complex collaborative agreements."[3]

These trends, and the accompanying urgent need for refined antitrust doctrine, are particularly pronounced in the economic realm in which NWOS operates: health care. The convergence, within this realm, of myriad economic pressures, technological innovation, and the need for innovation and reform make it a singular, and singularly important area for clear and sophisticated antitrust analysis.

To be sure, as everybody knows, the nation's health care system needs major innovation and reform. The reality and continuing prospect of radical technological innovation carries with it at once great promise and tremendous cost, the kinds of astronomical cost that fall squarely within the rationale advanced by Drucker.

Further, the health care marketplace is characterized by exceptional dispersal of the crucial economic actors. The majority of the nation's 600,000 practicing physicians practice as solo-practitioners or in small groups. And there are tens of thousands of hospitals, pharmacies and other providers, insurers, reinsurer, and other crucial actors. This vast and diverse structure increasingly demands that the participants form joint ventures if they are to participate (and compete) successfully in the world of health care, and keep pace with the ever-increasing demands for

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[3] FTC, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Vol. I, Chap. 10, "Joint Ventures," at 1 (1996).

innovation and reform. Yet the most routine economic analysis suggests that these vital health care actors will participate in this ongoing evolution, which is so urgently needed, only if the antitrust doctrines applicable to joint ventures are sufficiently clear and well defined to provide reasonably reliable guidance. This case provides the opportunity for the articulation of such guidance through the correction of the doctrinal errors of the appellate court.

The time for such guidance is particularly ripe. A year ago, a new model for health care was fashioned, based on intensive study of the particular market dynamics affecting health care. The study concluded that private competition in health care, if re-directed from insurance ("health plans, networks and hospital groups") to health care (the "prevention, diagnosis, and treatment of individual health conditions or co-occurring conditions of patients"), can produce "stunning gains in quality and efficiency."[4] Of course, the vibrancy of this model depends on, among other things, physicians and other crucial actors being able to operate within a regime of antitrust joint venture law that acknowledges and accommodates the particular demands of the health care marketplace.

The need for this evolution in antitrust law is acute. Antitrust analysts are "all but unanimous that *per se* rules are inappropriate for joint venture analysis" because, unlike "cartels, joint ventures are devices that frequently achieve legitimate business advantages."[5] But, as *Dagher*[6]

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[4] Porter & Teisberg, "Redefining Competition in Health Care," *Harvard Business Review* 65, 66 (June 2004).

[5] Pitofsky, "A Framework for Antitrust Analysis of Joint Ventures," 74 *Georgetown L. Rev.* 1605, 1621 (1986).

[6] *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108 (9th Cir. 2004).